No. 22-15705

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEJANDRO TOLEDO MANRIQUE,
Petitioner-Appellant,

v.

MARK KOLC,
Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of California.
No. 21-cv-08395-LB

APPELLANT'S REPLY IN SUPPORT OF MOTION FOR PANEL AND EN BANC RECONSIDERATION

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INTRODUCTION

Peru began investigating former president Alejandro Toledo in 2017. Six years later, Peru still has not formally charged Toledo with a crime. Nonetheless, the United States has agreed to extradite Toledo and a panel of this Court has denied Toledo's motion to stay his extradition pending appeal. The panel's published Order denying the stay misapplies this circuit's precedent and creates a conflict with the First Circuit. Reconsideration en banc is necessary to secure and maintain uniformity of the Court's decisions and to avoid an unnecessary circuit split.

ARGUMENT

I. Panel reconsideration is warranted because the panel overlooked *Aguasvivas* and misunderstood *Emami*.

The government argues that Toledo cannot receive panel reconsideration unless he identifies with particularity the points of law that he believes the panel has "overlooked or misunderstood." Govt. Response at 9. He has. As discussed in his motion for reconsideration, the panel overlooked the First Circuit's decision in *Aguasvivas v. Pompeo*, 984 F.3d 1047 (1st Cir. 2021), and misconstrued this Court's decision in *Emami v. U.S. Dist. Ct. for the Northern Dist. of Cal.*, 834 F.2d 1444 (9th Cir. 1987). *See* Motion at 11-13.

The government's only other argument against panel reconsideration is that, under Circuit Rule 27-10(b), a party may not file multiple motions for reconsideration of motion panel order. Govt. Response at 9. Toledo does not seek reconsideration of a motions panel order, though; he seeks reconsideration of the published order

issued by the merits panel. This is his first motion for reconsideration of the merits panel's decision, but even if it weren't, nothing in Rule 27-10(b) prohibits a renewed motion for reconsideration of a merits panel's order.

II. En banc reconsideration is warranted because the Order misapplied circuit precedent and disregarded established rules of treaty interpretation.

The government argues that en banc reconsideration is unnecessary because "[t]he Order does not conflict with a decision of the Supreme Court or this Court." Govt. Response at 10. This is incorrect. The Order misapplied circuit precedent regarding the standard for granting a stay; misconstrued circuit precedent regarding the significance of a charging-document requirement; and ignored established principles of treaty construction.

A. The panel's conclusion that Toledo failed to satisfy the first stay factor was a misapplication of *Leiva-Perez*.

The government points out that "Toledo does not argue that the panel misapplied *Nken*." Govt. Response at 10 (citing *Nken v. Holder*, 556 U.S. 418 (2009)). Toledo does, however, argue that the panel misapplied *Leiva-Perez v. Holder*, 640 F.3d 962 (9th Cir. 2011), the decision in which this Court explicated *Nken*.

In *Leiva-Perez*, this Court held that the first *Nken* factor can be satisfied either by showing a "substantial case for relief on the merits" or that the case raises "serious legal questions." *Id.* at 964. Even if the panel were correct that Toledo failed to show a substantial case for relief on the merits, a stay still would be warranted because his case raises serious legal questions.

The panel has chosen to publish the Order, making it binding precedent. *See* Circuit Rule 36-5. The decision to publish cannot be made lightly, because "binding authority is very powerful medicine." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001); *see also* Circuit Rule 36-2 (identifying the criteria for publication). Binding precedent "cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law." *Hart*, 266 F.3d at 1170 (emphasis in original). The very fact that the panel chose to make the Order binding is powerful evidence that Toledo's case presents "serious questions going to the merits."[1]

Moreover, a case "necessarily raises 'serious questions going to the merits'" when, as here, it raises an issue on which other courts are divided. *Bally v. State Farm Life Ins. Co.*, 2020 WL 3035781, *4 (N.D. Cal. June 5, 2020); *see also Heary Bros. Lightning Protection Co. Inc. v. National Fire Protection Ass'n, Inc.*, 2019 WL 13254487, *2 (D. Ariz. Apr. 5, 2019) ("Often a 'substantial case' is one that raises genuine matters of first impression within the Ninth Circuit or identifies a circuit split on an important question of federal law) (citations omitted); *Brown v. Wal-Mart Stores, Inc.*, 2012 WL 5818300, *2-*3 (N.D. Cal. Nov. 15, 2012) (granting stay where case presented issue in which "the district courts of the Ninth Circuit have split").

B. The panel's conclusion that the Treaty does not require formal charges was a misapplication of *Emami*.

The government argues that the panel's construction of the U.S.-Peru Treaty "followed circuit precedent." Govt. Response at 10. According to the government,

[1] The panel's decision to devote more than half of its 15-page Order to the merits of Toledo's appeal further demonstrates this fact.

since both the U.S.-Peru Treaty and the treaty in *Emami* contain "the same 'charged with' language," *Emami* dictates that neither treaty requires formal charges. Govt. Response at 11. But as *Emami* makes clear, the term "charged with" cannot be analyzed in a vacuum. In *Emami*, "charged with" was construed broadly because there was no charging-document requirement to narrow it. *Emami*, 834 F.2d at 1448. Here, by contrast, "charged with" must be construed more narrowly, because the U.S.-Peru Treaty includes a charging-document requirement, and "no better evidence of a 'substantive' requirement of a charge exists than a copy of the 'charge' itself." *In re Assarsson*, 635 F.2d 1237, 1243 (7th Cir. 1980).

The government argues that *Emami* and *Assarsson* found that "the absence of a treaty provision requiring a specific charging document (i.e., a German *Anklage* or a Swedish summons) was evidence that those treaties did not limit extradition to individuals who had been charged *by those specific documents*." Govt. Response at 11-12 (emphasis added). But neither *Emami* nor *Assarsson* suggested, much less held, that a charging-document requirement must identify specific documents by name. *See Emami*, 834 F.2d at 1448; *Assarsson*, 635 F.2d at 1243. Here, too, the crucial question is whether the Treaty requires production of "the charging document," not whether the Treaty identifies that document by name. As the government acknowledged in its answering brief, the U.S.-Peru Treaty requires "'a copy of the charging document' – whatever that might be under the requesting country's procedures." Govt. Brief at 30. In federal court in the United States, the Federal Rules of Criminal Procedure identify the charging document as the Indictment; in Peru, the Code of Criminal Procedure identifies the charging document as the *Orden de Enjuiciamiento*.

C. The panel disregarded established rules for interpreting treaties.

The government argues that the panel "relied on the rules for interpreting treaties," Govt. Response at 12, but the panel actually ignored several fundamental rules of construction.

The panel concluded that the Treaty's "drafting history" supported its interpretation, *see* Order at 9, but ignored the fact that earlier versions of the Treaty lacked a charging-document requirement, and that the unrefuted affidavits presented by Toledo showed that the charging-document requirement was added specifically in response to *Emami*. *See Merck & Co. v. Reynolds*, 557 U.S. 633, 648 (2010).[2] The panel also failed to acknowledge the significance of the drafters' decision not to extend Article I to anyone "sought for prosecution," as the United States had done in several other treaties. *See Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 13 (1936).

Instead, the panel relied upon the Technical Analysis, a document that is merely "a non-binding unilateral Executive Branch document that was not formally endorsed in 2000 by the Peruvian negotiators or by the U.S. Senate." 2-ER-195-96; *see also Abbott v. Abbott*, 560 U.S. 1, 42 (2020) (Stevens, J., dissenting) (noting that when construing a treaty, only the "diplomatic history – negotiations and diplomatic correspondence of the contracting parties relating to the subject matter – is entitled to great weight").

[2] The government argues that *Merck* is inapposite because it arose in the context of Congress's modification of a statute rather than the parties' modification of a treaty. *See* Govt. Response at 13 n.3. But the Court applies the same rules of construction to treaties as it does to statutes. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992).

The panel also ignored the "basic canon of statutory interpretation, which is equally applicable to interpreting treaties," that courts must "avoid readings that render statutory language surplusage or redundant." *Sacirbey v. Guccione*, 589 F.3d 52, 66 (2d Cir. 2009); *see also United States v. Wenner*, 351 F.3d 969, 975 (9th Cir. 2003) (directing courts to follow the "fundamental canon of statutory construction that a statute should not be construed so as to render any of its provisions mere surplusage"). If it were enough for an individual to be under investigation or suspected of a crime, there would be no need for a copy of the charging document; a copy of the arrest warrant would suffice.

Finally, while it is true that treaties are interpreted in a "broad and liberal spirit," it is equally important that this "be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence." *Tucker v. Alexandroff*, 183 U.S. 424, 437 (1902). The panel disregards this important limitation and instead interprets the Treaty so broadly as to allow Peru to demand that the United States arrest and detain Toledo for years without any formal charges against him. En banc reconsideration is necessary to correct the panel's impermissibly broad reading of the Treaty.

III. En banc reconsideration is warranted because the Order creates a circuit split on a question of exceptional importance.

En banc reconsideration is appropriate when a panel decision "involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). A question of exceptional importance exists where "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed

the issue." Fed. R. App. P. 35(b)(2). Here, en banc reconsideration is warranted because the panel decision conflicts with the First Circuit's decision in *Aguasvivas*.[3]

The government argues that there is no circuit split because *Aguasvivas* concerned "an entirely distinct issue." Govt. Response at 14. The facts in *Aguasvivas* are not identical, but the analysis is directly on point. Like the panel decision, *Aguasvivas* concerns an extradition treaty that was revised to add a charging-document requirement in light of *Emami* and *Assarsson*. *See Aguasvivas*, 984 F.3d at 1058. Like the panel decision, *Aguasvivas* relies on canons of statutory construction to assess the significance of those revisions. *See id.* And like the panel decision, *Aguasvivas* addresses the extent to which *Emami* and *Assarsson* apply to such treaties. *See id.* The only difference is that in *Aguasvivas*, the requesting country attempted to substitute an arrest warrant for the formal charging document, while in the present case Peru attempts to substitute the *Acusación Fiscal* for the formal charging document.

Finally, the government misconstrues the statement in *Aguasvivas* that "most people familiar with criminal procedure" would read a charging-document requirement to refer to "either an indictment, a criminal complaint, or in some circumstances in this country, an information." Govt. Response at 14 (quoting *Aguasvivas*, 984 F.3d at 1058). In that case, the government argued that the charging-document could be satisfied by producing a copy of an arrest warrant since the arrest

[3] The government argues that the Order's impact is limited to "one extradition treaty, as applied to the charging practice of one foreign counterpart." Govt. Response at 15. Yet the Order itself relied on cases interpreting extradition treaties with Germany (*Emami*), Sweden (*Assarsson*), and Serbia (*Sacirbey*). And *Aguasvivas* construed the effect of *Emami* and *Assarsson* on an extradition treaty with the Dominican Republic.

warrant "describes the criminal acts that Aguasvivas is alleged to have committed and it lists the Dominican statutes that Aguasvivas is alleged to have violated." *Aguasvivas* 984 F.3d at 1058. The First Circuit rejected this argument. It explained that a search warrant is not a charging document in the Dominican Republic, where formal charges are brought by criminal complaint or indictment. *Id.* And it added that its rejection of the search warrant as a charging document was consistent with how "[m]ost persons familiar with criminal procedure" would read the treaty's charging-document requirement.

Consistent with *Aguasvivas*, Toledo argues that the Treaty's charging-document requirement cannot be satisfied by any document that "describes the criminal acts that [Toledo] is alleged to have committed" and "lists the [Peruvian] statutes that [Toledo] is alleged to have violated." *Id.* Rather, the Treaty requires the charging document, whatever that document is according to the requesting country's rules of criminal procedure. In our federal system, formal charges are brought by indictment, unless the defendant knowingly and intelligently waives that requirement. Fed. R. Crim. P. 7. In the Dominican Republic, formal charges are brought by either indictment or criminal complaint. *Aguasvivas*, 984 F.3d at 1058. And in Peru, formal charges are brought only by *Orden de Enjuiciamiento*. 1-ER-61. Peruvian prosecutors cannot substitute a Prosecutor's Decision[4] or an *Acusación Fiscal* for the formal charging

[4] The extradition court's decision that Peru satisfied the charging-document requirement was based on Peru's submission of two Prosecutor's Decisions, not on the issuance of the *Acusación Fiscal*. 1-ER-62-63. Even though the *Acusación Fiscal* had already been issued, the government did not argue that it was the charging document. *See* 2-ER-133-179. Indeed, the government waited a year after the *Acusación Fiscal* was translated to even file it with the extradition court. 2-ER-164; EX 171.

document any more than an American prosecutor can rely on a complaint or a search warrant affidavit.

The panel's inexplicable failure to acknowledge *Aguasvivas* would itself be a reason for en banc reconsideration. The panel's issuance of an Order that directly conflicts with *Aguasvivas* makes reconsideration essential.

CONCLUSION

For the reasons set forth above, the Court should grant panel and en banc reconsideration.

Respectfully submitted,

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April 18, 2023

s/ Mara K. Goldman
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